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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**BEFORE THE**
**Federal Communications Commission**
**WASHINGTON, D.C.**

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| In the Matter of | ) | |
| | ) | |
| Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant To Section 332(c)(7)(B)(v) of the Communications Act of 1934 | ) | WT Docket No. 97-192 |
| | ) | |
| Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation | ) | ET Docket No. 93-62 |
| | ) | |
| Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities | ) | RM-8577 |

**COMMENTS OF THE**
**CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Cellular Telecommunications Industry Association ("CTIA")[1] respectfully submits its comments in the above mentioned proceeding.[2] In the Notice, the Commission seeks

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers Commercial Mobile Radio Service ("CMRS") providers, and includes forty-eight of the fifty largest cellular, broadband PCS, and mobile satellite providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

[2] See In the Matter of Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934; Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation; Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of Commercial Mobile Radio Service

comment on how to define certain terms contained in Section 332(c)(7)(B)(v) of the Act.[3] The Commission should define the terms "final action" and "failure to act" according to the intent of Congress, which seeks to provide carriers with an opportunity to bring an independent action to a court or the Commission within a reasonable period of time. Additionally, the statutory language, as interpreted by various Federal courts, gives the Commission clear authority to preempt any state and local actions based on the environmental effects of RF emissions, regardless of whether the effect of RF emissions constitutes the sole basis for the regulation or whether there is a formal statement indicating this purpose. CTIA also believes that legal precedent and Congress' clear statements vest with the Commission exclusive authority to establish and enforce RF rules concerning environmental effects, and that these rules constitute the sole authority on the matter and prevent States and localities from establishing their own requirements to demonstrate RF compliance.

**I. THE COMMISSION SHOULD INTERPRET THE STATUTORY LANGUAGE TO REFLECT CONGRESS' INTENT THAT STATE AND LOCAL GOVERNMENTS BE PRECLUDED FROM ESTABLISHING REGULATIONS THAT ARE BASED ON THE ENVIRONMENTAL EFFECTS OF RF EMISSIONS**

Section 332(c)(7)(B)(v) states that:

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Transmitting Facilities, WT docket No. 97-197, ET Docket No. 93-62, RM-8577, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking, released Aug. 25, 1997 ("Notice").

[3] Notice at ¶ 137.

> Any person adversely affected by a *final action* or *failure to act* by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. . . . Any person adversely affected by *an act or failure to act* by a State or local government or any instrumentality thereof that is inconsistent with [the prohibition on State or local government regulation on the basis of RF emissions] may petition the Commission for relief.[4]

The term "final action" should be interpreted in a manner consistent with the Congressional mandate that "the term 'final action' . . . means final administrative action at the State or local government level so that a party can commence action under the [statute] rather than waiting for the exhaustion of any independent State court remedy otherwise required."[5] The legislative history clearly instructs that wireless providers be afforded the opportunity to seek relief from the Commission from an adverse action of a State or locality as long as some decision has been made, regardless of whether an independent appeal of that decision is pending at the appellate level. By analogy, when determining whether a Federal administrative action is final, courts have determined that under the Administrative Procedure Act "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial

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[4] 47 U.S.C. § 332(c)(7)(B)(v).

[5] H.R. Rep. No. 104-458, 94th Cong., 2nd Sess., at 209 (1996) ("Conference Report").

review," allowing review of a "broad spectrum of administrative actions."[6] Absent clear statutory language otherwise, the Commission should similarly allow review of a broad range of state and local actions, including those which have pending appeals at the State and local level.

As the Commission noted, while Congress provided no specific definition for the term "failure to act," Section 332(c)(7)(B)(ii) requires decisions regarding personal wireless service facilities siting to be rendered "within a reasonable period of time . . . taking into account the nature and scope of such request."[7] In determining whether a state or local government has failed to act on a case-by-case basis, it should take into account not only how state and local governments process other RF-related actions, but also how these governments process other facility siting requests. Because the Commission has exclusive jurisdiction over RF issues,[8] any process governing a decision regarding the placement, construction, and modification of wireless service facilities should be modeled after other similar siting requests rather than processes that may be required to measure and analyze the effects of RF emissions. CTIA

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[6] Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967) (citing H.R. Rep. No. 1980, 79th Cong., 2d Sess., at 41 (1946), U.S. Code Cong. Serv. 1946, p. 1195).

[7] 47 U.S.C. § 332(c)(7)(B)(ii).

[8] See discussion *infra*.

believes that a 90-day period should provide more than adequate time for final resolution of siting concerns.[9]

The Commission also seeks comment on how it should interpret the language in the Conference Report stating Congress' intent that States and localities be prevented from basing regulations *directly or indirectly* on the environmental effects of RF emissions.[10] The courts have determined that this provision prohibits state and local actions that are based only partially on the environmental effects of RF emissions. In Seattle SMSA Limited v. San Juan County, the U.S. District Court for the Western District of Washington held that denial of the cellular provider's application for a use permit was inappropriate since the local Board based its decision in part on the residents' concerns about the health effects of RF emissions. Because the Board "relied on evidence which could not be considered in making their decision as a matter of law," the court found that remand to the local Board was appropriate.[11]

The Seattle SMSA case also indicates that Section 332(c) gives the courts and the Commission authority to

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[9] See In the Matter of Federal Preemption of Moratoria Regulation Imposed by State and Local Governments on Siting of Telecommunications Facilities, DA 96-2140, FCC 97-264, CTIA Comments at 11 (filed Sept. 11, 1997).

[10] Conference Report at 208.

[11] Seattle SMSA Limited v. San Juan County, No. C96-15212, at 6 (D. Wash. Apr. 11, 1997).

review state and local actions that appear to be based on RF concerns but for which no formal justification is provided.[12] The court in that case determined that remand of the local zoning body's application denial was justified even though the zoning body acknowledged that "[i]t has been decided by the Federal Government that the proposed use will not cause significant adverse impacts on the human or natural environments." Although the Board explicitly acknowledged Federal compliance, review and remand of the Board's decision was appropriate because it was unclear to what extent the Board relied on testimony or other evidence about possible adverse impacts of RF emissions in making its decision.[13] Thus, although the formal justification for denial did not explicitly rely upon concerns regarding RF emissions, the court still determined that the substantial testimony surrounding these concerns constituted a violation of Section 332(c)(7)(B)(iv).

## II. THE COMMISSION SHOULD NOT ALLOW LOCAL AND STATE GOVERNMENTS TO REQUIRE ANY SHOWING OF COMPLIANCE WITH RF EMISSIONS LIMITS AS PART OF THE LOCAL APPROVAL PROCESS

Congress' clear statements in the 1996 Act extends exclusive jurisdiction over the regulation of RF emissions to the Commission. Specifically, Congress provided that

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on

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12 See Notice at ¶ 140.

13 Seattle SMSA, at 7.

> the basis of the environmental effects of radio frequency emissions . . .[14]

Contrary to the contention of the Local and State Government Advisory Committee ("LSGAC"),[15] state and local governments do not have the authority to promulgate rules or requirements based on the environmental effects of RF emissions. The Act does not allow individual localities to impose separate and distinct requirements regarding RF emissions, procedural or otherwise, on wireless carriers. The Commission's RF rules provide extensive calculations and measurements to determine whether licensees are in compliance with the Commission's limitations. CMRS devices are subject to environmental evaluation for RF exposure prior to equipment authorization or use. Moreover, technical information showing the basis for this evaluation must be submitted to the Commission upon request.[16] Congress has specified that the Commission's RF rules concerning environmental effects are to be the exclusive authority, therefore there is no place in the regulatory scheme for individual requirements imposed by various States and localities.

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[14] 47 U.S.C. § 332(c)(7)(B)(iv).

[15] See LSGAC Advisory Recommendation Number 5 (adopted June 27, 1997).

[16] 47 C.F.R. § 2.1091.

The courts have confirmed the Commission's exclusive authority over RF issues.[17] Recently, a Federal District Court conclusively stated that "Section 332 . . . does not, expressly or by implication, authorize state or local regulation of radio frequency interference which may be produced by cellular telecommunications facilities."[18] The court found that even though Section 332 of the Act does not explicitly assign the Commission exclusive jurisdiction over RF *interference* regulation (versus RF emissions regulation), case law and the legislative history require that regulation of RF interference fall under the broad regulatory umbrella of issues involving the transmission of radio signals, over which the Commission has exclusive jurisdiction.[19] There is

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[17] See Seattle SMSA Limited v. San Juan County, No. C96-15212, at 6 (D. Wash. Apr. 11, 1997); Illinois RSA No. 3, Inc. v. County of Peoria, No. 96-3248, at 22 (D. Ill. Apr. 28, 1997). See also In re Appeal From Decision of Meridian Council Powertel/Memphis, Inc., No. 97-CV013(R) at 6 (May 7, 1997); Westel-Milwaukee Co., Inc. v. Walworth County, 1996 Wisc. App. Lexis 1097, *9 (Wisc. App. Sept. 4, 1996) ("The Act plainly prohibits a local authority from considering the possible effects of these emissions in their decision making.").

[18] In re Appeal of Graeme and Mary Beth Freeman, 1997 WL 467031 (D. Vt. Aug. 11, 1997).

[19] Id. (citing Broyde v. Gotham Tower, Inc., 13 F.3d 994 (6th Cir.), cert. denied, 511 U.S. 1128 (1994); Great Lakes Wireless Talking Machine Co. v. Hayes, No. CIV-91-6140T, slip op. at 9 (W.D.N.Y. Jun. 25, 1991); Still v. Michaels, 791 F.Supp. 248 (D.Ariz. 1992); Blackburn v. Doubleday Broadcasting Co., 353 N.W.2d 550 (Minn. 1984); Helm v. Louisville Two-Way Radio Corp., 667 S.W.2d 691 (Ky. 1984); Fetterman v. Green, 689 A.2d 289 (Pa. Super.), appeal denied, 695 A.2d 786 (Jun. 17, 1997); Still v. Michaels, 803 P.2d 124 (Ariz. App. 1990) review denied (1991); Smith v. Calvary Educ. Broadcasting Network, 783 S.W.2d 533 (Mos.App. 1990)).

no provision in the Act that permits the Commission to delegate this authority to the States. Thus, the Commission should be wary of diminishing its authority over the regulation of RF emissions by allowing State and local governments to impose separate and distinct burdens on carriers which are unnecessary and unauthorized. Rather, State and local governments that seek to challenge or ensure a licensee's compliance with the applicable Federal RF rules should be limited to obtaining assurance from the Commission that its RF rules are strictly enforced.

## CONCLUSION

For the reasons stated above, the Commission should interpret the statutory terms and legislative history consistent with Congress' intent that State and local governments be precluded from establishing regulations that are based on the environmental effects of RF emissions. Additionally, the Commission should not allow local and State governments to require any showing of compliance with RF emissions limits as part of the local approval process.

Respectfully submitted,

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